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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOSHUA LOPEZ, Petitioner.	2 CA-CR 2012-0321-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2005008850005DT

Honorable Andrew G. Klein, Judge

REVIEW GRANTED; RELIEF DENIED

Joshua Lopez — Buckeye
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Joshua Lopez has filed a petition for review challenging the trial court's dismissal of his notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. in Lopez's second post-conviction proceeding.[1] We will not disturb the trial court's ruling absent a clear abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Lopez has not sustained his burden of establishing such abuse here.

Background

¶2 Lopez was charged in another case, CR2004-023923-001 ("the 2004 case") with various offenses related to his stealing a car in December 2004; he entered into a plea agreement in April 2005, and it appears he was sentenced to a fourteen-year prison term in May 2005. A week before Lopez was sentenced in that case, he was charged in this case, CR2005-008850-005 ("the 2005 case"), with trafficking in stolen property, specifically, a Nissan Altima and a Jeep Cherokee, having sold the vehicles to undercover law enforcement officers in November 2004. In July 2005, pursuant to a plea agreement, Lopez pled guilty in the 2005 case to second-degree trafficking in stolen property—the Nissan Altima, count fifteen of the indictment, as amended—with two historical prior felony convictions. He was sentenced on September 16, 2005, to a prison term of 11.25 years, to be served concurrently with the sentences in the 2004 case.

[1]Although the trial court stated in its minute entry ruling it was dismissing Lopez's notice of post-conviction relief and refused to address the merits of his claim, Lopez filed a petition for post-conviction relief simultaneously with his notice. Thus, despite the court's statement that it would not address the merits of Lopez's arguments, it did not strike the petition, therefore, technically it did not simply dismiss the notice of post-conviction relief but it essentially denied the petition as well.

¶3 On March 7, 2006, Lopez was charged in CR2006-006469-001 ("the 2006 case") with three offenses that apparently arose out of the theft of the Nissan Altima, including kidnapping, a dangerous crime against children; armed robbery; and theft of a means of transportation. Lopez asserted in his petition for post-conviction relief that these offenses were the subject of one of three police reports trial counsel had received in connection with the 2005 case; one report related to the theft of the Nissan Altima, the other to the Jeep Cherokee, and the final report related to the sale of the stolen vehicles. Lopez entered a plea agreement in the 2006 case and was sentenced to a seventeen-year prison term, to be served concurrently with the terms imposed in the 2004 and 2005 cases.

¶4 Lopez filed a notice of post-conviction relief in April 2011 in which he stated he intended to seek relief based on a claim of newly discovered evidence. The new evidence was a January 25, 2011 letter from his trial counsel, which Lopez intended to use to support a claim that trial counsel had been ineffective because he had believed by entering the plea in the 2005 case he had resolved all offenses that were the subject of the three police reports, including those arising out of the taking of the Nissan Altima. Lopez did not state why the notice was untimely, *see* Ariz. R. Crim. P. 32.2(b), other than that he had just received the letter, and he asserted there are no time limits for claims of ineffective assistance of counsel. In the letter, counsel explained to Lopez that she could not represent him in the post-conviction proceeding. She added that the "core" of his complaint was not, as Lopez apparently believed, that the prosecutor had violated the plea agreement, but that she had been ineffective because she "had read the police reports

about the carjacking but failed to ask the County Attorney to include a stipulation not to charge [him]." Counsel told Lopez to contact her or have any appointed counsel contact her if he were to seek post-conviction relief and "want[ed] an affidavit."

¶5 The trial court dismissed the notice on May 12, 2011, finding the letter from counsel was not new evidence as contemplated by Rule 32.1(e) and the time had expired for raising a claim of ineffective assistance of counsel. *See* Ariz. R. Crim. P. 32.4(a). The court concluded Lopez had failed "to state a claim for which relief can be granted in an untimely Rule 32 proceeding." Lopez filed a petition for review, which was denied. He then filed a motion for reconsideration in which he attempted to supplement his claim of newly discovered evidence with trial counsel's affidavit. This court denied the motion in September 2011, noting all evidence must be presented first to the trial court. *State v. Lopez*, No. 1 CA-CR 11-0388 PRPC (order filed Sept. 16, 2011).

¶6 On October 6, 2011, Lopez filed a notice of post-conviction relief and a pro se petition for post-conviction relief. He attached trial counsel's affidavit to the petition, again seeking relief based on newly discovered evidence. In its October 7, 2011 minute entry, the trial court dismissed the notice of post-conviction relief. After reviewing the history of the case and summarizing what constitutes a claim of newly discovered evidence under Rule 32.1(e), the court stated that Lopez's claim of newly discovered evidence was based on a letter from trial counsel. The court added that it would not "address the merits of the defendant's claim because it has already done so," having addressed the "identical" claim, which Lopez had raised in the first post-conviction proceeding. This petition for review followed.

Discussion

¶7 We first note the two post-conviction proceedings were not "identical" because the first was based on nothing more than counsel's letter. In support of this proceeding, however, Lopez had filed his own affidavit and trial counsel's affidavit. And counsel's affidavit, which was attached to the petition that the court apparently did not consider, stated she had been "surprised and concerned" when she learned Lopez was charged in the 2006 case with various offenses arising out of the theft of the Nissan Altima because she "had assumed that as a result of the plea agreement in the 2005 Case, no additional charges would be brought in connection with the theft or sale of the Altima." She added that she had "some recollection" she had told Lopez the plea agreement in the 2005 case would resolve all of the charges "that might arise from the three police reports and that it was not necessary to include either an express provision to that effect or a stipulation that the State would not bring any further charges arising from the three police reports." But she also stated she had so informed Lopez's counsel for the 2006 case, who then negotiated the plea in that case with the knowledge that Lopez and his former counsel had been surprised by the new charges.

¶8 Notwithstanding the trial court's mischaracterization of the first and second post-conviction proceedings as identical, Lopez nevertheless has failed to persuade us the court abused its discretion in summarily denying his request for post-conviction relief. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (fact trial judge reaches correct conclusion for wrong reason irrelevant; appellate court must affirm if result legally correct for any reason). Lopez's true claim is a claim of ineffective

assistance of counsel, which is "cognizable under Rule 32.1(a)," *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010), and does not, therefore, fall within any of the exceptions to the timeliness requirements of Rule 32.4(a). As the court correctly concluded in dismissing the first notice of post-conviction relief, the time for asserting that claim had expired before the first and second notices were filed. *See* Ariz. R. Crim. P. 32.4(a).

¶9 Moreover, counsel's affidavit, like the letter that had been attached to the first notice of post-conviction relief, does not constitute newly discovered evidence as contemplated by Rule 32.1(e). *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) ("Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence."). At the very least, Lopez knew about the potential claim the affidavit relates to as soon as he was charged in the 2006 case. Indeed, in his affidavit, Lopez stated he had told counsel who represented him in 2006 he was surprised by the new charges and thought "all charges that might later arise from all three police reports" had been resolved by the plea agreement in the 2005 case. Nevertheless, he entered a plea in that case and did not immediately seek to set aside the 2005 conviction. That counsel memorialized her surprise by the 2006 charges in an affidavit she executed in August 2011 does not make the affidavit itself newly discovered evidence under the rule.

Disposition

¶10 For these reasons, although we grant the petition for review, relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge